

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1216

To be argued by
MILTON S. GOULD

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P/S

IN THE
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

against

CHAIM KAHAN, SOLOMON WERCBERGER and
MOR WERCBERGER,

Defendants-Appellants.

ON APPEAL FROM JUDGMENTS OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS

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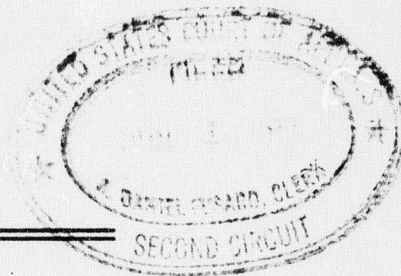


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-1216

UNITED STATES OF AMERICA,

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-against-

CHAIM KAHAN, SOLOMON WERCBERGER
and MOR WERCBERGER,

Defendants-Appellants.

BRIEF FOR APPELLANTS

PRELIMINARY STATEMENT

After a six-day jury trial in the United States District Court for the Eastern District of New York, defendants-appellants Mor Wercberger, Solomon Wercberger and Chaim Kahan were convicted on one count of knowingly possessing stolen goods which had moved in interstate commerce in violation of 18 U.S.C. § 659. They were each acquitted of a charge of conspiring to do so in violation of 18 U.S.C. § 371. On March 18,

1977, the District Court (Honorable Jacob Mishler, U.S.D.J., C.J.) entered judgments of conviction and imposed upon each of the appellants a sentence of imprisonment for three years (1106a, 1107a, 1108a). None of appellants had any previous record of convictions for any crimes.

ISSUES PRESENTED FOR REVIEW

1. Does an indictment properly charge a conspiracy between the defendant and the persons who stole property, where all it alleges as to the defendant's role is that he did no more than receive the stolen property from the thieves? May a charge of conspiracy to receive and possess stolen property be submitted to a jury, where at best all that is proved is that the defendant agreed to and did receive the stolen property from the thieves?

2. In a prosecution for conspiracy to receive and possess stolen property, may the trial court receive in evidence damaging hearsay statements of alleged co-conspirators which implicate a defendant (if at all) by innuendo only, and may the Court refuse subsequently to dismiss the conspiracy count and to strike the evidence received thereunder, where

(a) the only agreement by the defendant alleged and even arguably proved was an agreement merely to receive and possess the stolen property?

(b) the hearsay statements were not made until after the alleged object of the conspiracy was achieved or frustrated, i.e., until after the defendant had received and possessed the goods, and after law enforcement officials had seized the goods and arrested the defendant?

(c) the only basis argued by the prosecution for the admission of the hearsay statements is the proposition that the conspiracy included a purchase by the defendant of the goods with payment to be made later, but no such object of the conspiracy has been alleged in the indictment and no agreement to purchase has been proved by any non-hearsay evidence?

(d) the declarant is not shown by any evidence to be a member of the alleged conspiracy?

(e) the hearsay statements received constitute the only evidence in the case linking the defendant to the thieves (and then only by strained implication), and thus constitute the only evidence in the case which even arguably tends directly to show knowledge on the part of the defendant that the goods were stolen?

(f) the question whether the defendant had knowledge that the goods were stolen was the most hotly contested issue in the case?

3. In a prosecution for knowing possession of stolen property, may evidence that the defendant possessed other property on an earlier date be received on the theory that it is offered to prove a prior similar act, where there is no proof that such other property was stolen? In such circumstances is the trial court permitted to give an instruction to the jury as to prior similar acts?

4. Does a trial court act properly in refusing to suppress goods seized under a search warrant, and in receiving them in evidence during the prosecution for unlawful possession thereof, where

(a) the affidavit in support of the application for the warrant contains no showing whatever that the property to be searched for and seized constitutes (or that the premises to be searched contain) "evidence of the commission of a criminal offense, ... contraband, the fruits of crime,...things otherwise criminally possessed, or property designed or intended for use or which is or has been used as the means of committing a criminal offense," within the meaning of Rule 41(b), F.R.Crim.P.?

(b) the affidavit is based on the hearsay statements of an allegedly reliable informant, but contains no statement as to the basis for the informant's conclusion (even if such conclusion could be read into the affidavit by implication) that there is illegal activity or property which may be seized under Rule 41(b) on the premises to be searched?

(c) the affidavit contains a highly material misstatement, i.e., it states that the informant has personally seen the property to be searched for on the premises to be searched, when in fact he has seen no such thing?

STATEMENT OF THE CASE

The Indictment and
the Course of Proceedings

The indictment contained two counts. Count One alleged that appellants herein and co-defendants Manuel V. Gomez, Stanley Diamond, Vincent Santa and Frank Joseph Maloney conspired knowingly to receive and possess 5,072 cartons of Schick shaving products which had been stolen from an interstate shipment by tractor trailer.* Count One alleged three, and only three, overt acts. It alleged that Gomez rented a car on March 10, 1975 (Overt Act 1), that appellants received goods on March 13, 1975 (Overt Act 2), and that Gomez, Santa and Diamond met on March 14, 1975 to discuss the receipt of payment for the stolen products (Overt Act 3).

Count Two charged appellants alone with receiving and possessing the Schick products, knowing them to have been stolen.

Appellants were arrested on March 13, 1975, but the charges against them did not survive a preliminary hearing and were dismissed by a Magistrate on April 30, 1975, upon the government's failure to proceed at that time.

* Gomez, Diamond, Santa and Maloney were severed and did not stand trial with appellants. Neither did they testify.

Nearly six months later, and on October 16, 1975, the present indictment was filed. Appellants pleaded not guilty on October 24, 1975. On or about November 18, 1975, appellants moved for an order dismissing the charges for violation of the "six-month rule" set forth in Rule 4 of the Plan for Achieving Prompt Disposition of Criminal Cases; for a bill of particulars; for severance; for suppression of all evidence seized from appellants' warehouse; for discovery and inspection; and for dismissal of the conspiracy count for failure properly to allege an offense. On November 21, 1975, the District Court denied all of these motions in their entirety.*

A second or renewed motion for suppression was made by appellants on or about March 1, 1976, on the ground that the search warrant under which evidence had been seized was issued without probable cause. The motion was denied by decision and order dated July 6, 1976.

The trial began with jury selection on January 17, 1977. Before any evidence was taken, however, the prosecutor disclosed that there had been a misstatement in the affidavit supporting the search warrant. The Court then ordered that an immediate evidentiary hearing be had concerning the vali-

* The motion for discovery and inspection was denied as moot. The remainder of the motions were denied on the merits.

dity of the seizures made under the warrant. After the hearing, which was held on January 18, 1977, the Court again ruled that the evidence need not be suppressed.

The government commenced its case in chief on January 18, 1977. The jury was charged on January 24, 1977, and retired to deliberate on the morning of January 25, 1977. After some hours of deliberation, the jury returned its verdict that afternoon. The jury found all three appellants not guilty on Count One, the conspiracy count, but found all three appellants guilty on Count Two, the substantive count.

The Evidence

The government's case

The case involved a hijacked truckload of Schick shaving products, consisting primarily of razor blades and kits in which blades and razors were packaged together (hereinafter, the "razor blades" or the "goods"). Appellants were warehousemen. They owned and operated CBS Warehouses Inc. ("CBS"), which occupied three of the seven floors in one of the buildings at the Bush Terminal in Brooklyn. Two days after the hijacking, several FBI agents, acting on a tip from a paid informer that the goods had been delivered to CBS, kept the building under surveillance for some hours. After another FBI agent arrived

late in the day with a search warrant, the agents entered the building, went to the floors occupied by CES, located the goods, interrogated appellants, and arrested them.

The government's first witness was Carroll Bridgeforth, a truck driver who testified that his truck was hijacked in New Jersey while he was transporting Schick shaving products from Connecticut to California, on the night of March 11, 1975. Bridgeforth was taken into the hijackers' car and forced to ride with a coat over his head; the hijackers, meanwhile, kept the radio turned up to prevent him from hearing their conversation (295a). Bridgeforth did not identify the hijackers. He testified, however, that at one point he heard someone get into the car and say, "The buyer was well satisfied with the load" (295a).

Paul Pollari, a paid FBI informer (343a) was then called. He testified that one Deffilipo telephoned him on the evening of March 11, 1975 and told him there was work to do the next morning (310a), which consisted of off-loading a Time-DC trailer containing razor blades into a rented truck. He was told he would be working with Deffilipo's brother, one DeLuca, and alleged co-conspirators Santa and Gomez. Over objection, Pollari was permitted to testify that Santa told him another truck was to be driven to appellants' warehouse (151a-152a). On March 12, Pollari assisted in the transfer of a portion of the goods from

the Time-DC trailer to a rented truck. He did not, however, go in the truck to appellants' warehouse. On the evening of March 12, 1975, Pollari was told that he would be driving a truck to appellants' warehouse the next day, and that the truck would be loaded with Schick products which had been on the Time-DC trailer (330a-337a).

Pollari in fact drove a truck containing the Schick products to CBS on March 13, 1975. After helping to unload it, he left and went to the home of one Thomas DeCandia, where he was paid for his services by Santa (342a). At that time, he testified, Santa told him that the FBI had raided the warehouse shortly after he had left. He testified that Santa had said, "We have nothing to worry about, it's on their end" (342a).

In the meanwhile, on the night of March 12, 1975, Pollari had informed FBI agent Robert Pecoraro of "what was going on" (331a).

Pecoraro did not testify at the trial, but one of his companions, FBI agent Donald Dowd, testified. Dowd said that he and Pecoraro commenced surveillance of the warehouse about 10:30 on the morning of March 13, 1975 (349a). He said that he saw a truck pull up, and saw Pollari and Gomez emerge and start unloading cartons. He did not describe the markings on the cartons. Dowd said that later two additional trucks,

driven by the Deffilipo brothers, also pulled up. He saw that these trucks contained Schick cartons as they were being unloaded (354a). Dowd testified that as each truck arrived, appellants either participated in the unloading or were on the loading dock (352a, 353a).

Eventually the trucks and their occupants left the warehouse. The agents had not revealed themselves during the unloading, having no arrest warrant and apparently believing that in the circumstances an arrest without a warrant would not be proper. They waited for the arrival of FBI agent Patrick Colgan, who was expected to bring a search warrant.* Pecoraro had telephoned Colgan earlier in the day to instruct him to obtain a search warrant. Colgan did not arrive until a half hour or an hour after the trucks had unloaded at the warehouse and had left (355a, 395a).

When Colgan arrived with the search warrant, the agents entered the building, ascended in the elevator to the CBS floors (after some difficulty with the elevator), and emerged at the CBS office (355a, 380a, 389a, 392a).

* Even after the agents had obtained the search warrant and had located the goods on the CBS premises, they still telephoned the United States Attorney's Office for authority to make the arrests (361a). The decision to arrest was made by the United States Attorney's Office, not the agents (216a).

The agents stated that they were there to execute a search warrant (196a-197a). They located the Schick goods (357a, 396a), interviewed appellants (358a-360a; 396a-407a), and eventually arrested them (216a, 361a). When the agents questioned appellants about their possession of the goods, appellants voluntarily turned over to them certain documents of title (400a-407a). Agent Colgan testified later at the trial, and confirmed this (401a-407a). In particular, appellant Mor Wercberger supplied a truckman's bill of lading (Gov. Ex. 2), which stated that it covered 1,654 cartons of "razors and blades" (401a). The bill of lading was dated March 1., 1975, and showed that the items covered by it were consigned to "International Trading Co. c/o CBS Warehouses." Mor Wercberger later testified that he did not sign the bill of lading, because the quantity set forth in it did not agree with his count (655a-659a). Also turned over were two internal CBS documents, a form of invoice and a form of receipt (Gov. Exs. 2-C, 2-E), describing the items received and showing a count of 1,606 pieces (405a). In addition, after the arrest, the agents searched appellants and found in Mor Wercberger's wallet a slip of paper (Gov. Ex. 13) bearing what appeared to be a list describing the goods which had been received at the warehouse (361a-362a). Mor Wercberger later testified that he customarily jots down on a piece of paper a description and count of arriving goods, so that he can later give

this information to the bookkeeper for billing purposes (695a-701a). This was confirmed by defense witness Frieman, the CBS bookkeeper (792a).

The government also called agent Colgan as a witness. One of the major purposes in doing this was to attempt to prove a "prior similar act" by appellants. Colgan testified that he had been to CBS before March 13, 1975, and in particular on February 4, 1975. Appellants' objection at this point was overruled (408a). Agent Colgan was then permitted to tell the jury that on February 4, 1975, he had gone to CBS because he had been given "information" that "there was a stolen load of Whitehall Laboratory products" there (408a). He testified that he received appellants' permission to search and that he did find Whitehall Laboratory products (408a). Colgan's efforts to describe the Whitehall products as "stolen" were immediately ruled by the judge to be a "conclusion" (408a). In fact, no evidence that the products were stolen was ever offered. The government offered the testimony of a handwriting expert who testified merely that the handwriting on the bill of lading relating to the Whitehall products was the same as that on the bill of lading relating to the Schick products (600a, 603a). The government also put an FBI agent named Smith on the stand, who testified that he had gone to CBS and seized the Whitehall products under a search warrant the day after

Colgan had located them (571a-572a). Smith was unable to testify, however, that the Whitehall products were stolen.

The government next offered the testimony of Harry Devine, a Whitehall traffic and warehouse manager. Devine's testimony merely demonstrated that he had caused the Whitehall products to be shipped from Whitehall's New Jersey plant to its Dallas, Texas plant, but that the products had not arrived at their destination (581a). That ended the government's efforts to prove that the Whitehall incident was a prior similar act.

The government called Thomas Cogar, currently in jail (503a), and formerly a paid informer (504a-505a). His evidence consisted entirely of hearsay statements by others, made outside the presence of appellants. We argue below that the Cogar testimony was the most important evidence in the case, was highly damaging, and that the jury should never have been permitted to consider it.

Cogar testified that he was paid by government agents to sit in on card games at Thomas DeCandia's house (517a). He then testified concerning conversations between alleged co-conspirators Santa and Diamond at which he was present. The conversations about which Cogar testified all occurred after appellants had been arrested and after the goods had been seized. In none of the conversations were appellants referred to by name, or even by description sufficient to differentiate them from other Orthodox Jews.

Cogar testified that on March 14, 1975 he was in his father-in-law's dress shop with Diamond and Santa (518a). Santa was reading a newspaper article about the Schick shaving products, and apparently referring to the seizure and arrest (518a). Cogar testified (518a),

"Mr. Santa was reading a newspaper and handed the paper over to Stanley Diamond and said, 'What do you think of the rabbis?'

"Stanley Diamond said that, 'They're stand-up people.'"

Cogar testified that later the same day, he was present at DeCandia's house where he heard the following conversation (521a):

"Mr. Santa asked Stanley Diamond if he thought that, he asked, well, his words were, 'What do you think of,' you know, 'about it?'

"And, Stanley said, 'They're tough people, they won't get anything out of them.'"

The "rabbis" were never identified by name. Cogar inquired if they were "really rabbis the government arrested" (521a) and was told by Diamond, "'No. They're Orthodox Jews, they wear black hats and beards'" (521a).

Cogar was permitted to testify to further hearsay declarations which apparently took place on March 19, 1975,

six days after the goods were seized. On that day, according to Cogar, Santa "said that he was going to see them, the rabbis, on Saturday about getting the rest of the money" (522a).

The prosecutor also elicited the following testimony concerning the wealth of the Jewish people* (522a-523a):

"Q. Did you have any conversations at that point; Stanley Diamond?

"A. Yes, sir.

"Q. What if anything did Stanley Diamond say?

"A. Stanley Diamond said that everybody thinks that the Italians have all the money in New York but it was really that the Jewish people had all the money. The money that they had received was brand new one hundred dollar bills with the wrappers that had the Star of David on it.

"Q. Did he indicate from whom he had received the money he was referring to?

"A. Yes, he said the money that they had gotten from the rabbis and other comments such as, that money was buried and not in banks, money that could never be, you know, shown."

* It has been said that racial or ethnic prejudice "can violently affect a juror's impartiality and must be removed from the courtroom proceedings to the fullest extent possible." United States ex rel. Haynes v. McKendrick, 481 F. 2d 152, 157 (2d Cir. 1973). See also Rule 403, Fed. R. Ev.

Promptly after Cogar was called to the stand and immediately on learning that Cogar was about to testify to conversations occurring after the arrest, appellants' counsel objected strenuously and moved to exclude the testimony (474a-477a). Appellants' counsel argued that the statements could not possibly be deemed to be in furtherance of any conspiracy, because the conspiracy had ended and because the remarks were mere narrative (475a-476a). Counsel argued that even if the testimony were later stricken, nevertheless its admission would "permanently taint this jury" (477a).

Initially, the District Court agreed, saying (480a),

"THE COURT: The conspiracy alleged is to possess the goods, there's no question that the possession ceased when the goods were seized by the Government, right?"

The government argued that the conspiracy continued past the seizure of the goods, since the "defendants were purchasers of the merchandise" (481a). Although the government argued that it had "proof" of that contention (481a), this was not true. The Court was misled about this for a time, but ultimately learned during the colloquy that the jury had actually heard that appellants were purchasers only during the prosecutor's "opening statement" (490a). At this point the prosecutor admitted that he had no "direct" evi-

dence that appellants were purchasers, but "only circumstantial" (490a). After further argument, the Court agreed, and ruled that the Cogar testimony would be received (493a-495a). There was a further objection after Cogar started to testify that the "rabbis" were "stand-up people." Counsel for appellants argued that statements of this sort could not possibly be in furtherance of any conspiracy. The Court excused the jury and heard the testimony on voir dire. The Court then overruled the objection (513a-514a).

Counsel later moved again to exclude or strike Cogar's testimony on the ground that Diamond, the principal speaker in the conversations related by Cogar, had not been shown to be a participant in the conspiracy (618a-621a). The Court denied the application, apparently holding that Diamond's presence at the card games at DeCandia's house was sufficient to permit the testimony to be submitted to the jury (623a-624a). The Court also denied appellants' motions to dismiss the conspiracy count at the close of the government's case (629a), and at the close of all the evidence (883a).

The defense case

All defendants testified. They stated that they were highly Orthodox Jews, and that they had had less than six years' experience in the warehousing business at the time they were

operating CBS (631a, 802a, 831a-832a). Mor Wercberger testified that it was the nature of their warehousing trade that goods would come in "off the street" from tradesmen not previously known to them, who sometimes did not have complete documentation or, if they did, whose documentation did not indicate the ultimate consignee (643a-645a). Numerous examples of documents of title, unquestionably representing legitimate transactions, whereon the ultimate consignee did not appear, were admitted in evidence (Def. Exs. A - L2). All appellants denied knowing either the truckers who made the deliveries of March 12 and 13, 1975, or the alleged co-conspirators (784a-785a, 836a-837a, 702a, 811a-812a). They denied knowing the goods had been stolen, and denied having bought the goods (638a, 811a-812a, 836a-842a). Their position was that they understood that the goods were to be picked up by the "International Trading Co.," the named consignee.

The defense also tendered a witness who would have thrown doubt on certain of the statements by Diamond contained in the Cogar testimony. The witness, an expert on Orthodox Judaism, would have testified that appellants, as Orthodox Jews, would not have transacted any business on a Saturday, and would certainly not have used the Star of David, a very sacred symbol, on money wrappers. This testimony was excluded when the government offered a stipulation concerning these customs.

The defense also tendered the testimony of a Mr. Dorrio, a man whose name had been written on the back of the slip of paper in Mor Wercberger's wallet. Mr. Dorrio was simply a banker to whom Mr. Wercberger had applied for a car loan, which was not consummated. The government again stipulated the facts (865a-868a).

The suppression hearing

At the opening of the trial, the prosecutor informed the Court that the affidavit of agent Colgan in support of the search warrant issued on March 13, 1975 contained an error (171a). Colgan's affidavit had contained the sworn statement that a reliable informant had been "in the above described premises known as CBS Warehouse on March 12, 1975," and that the "informant observed several thousand cartons" of Schick razors there on that date (135a). The prosecutor said that the informant, who turned out to be Pollari, had not been inside the CBS warehouse on March 12, 1975 at all.* The Court then held an evidentiary hearing on the sufficiency of the affidavit.

Agent Colgan's testimony at the hearing established only that he had been called by agent Pecoraro between 11:45 and 12:30

* We argue below in Point III that even if the affidavit had contained no misstatements, it would have been facially insufficient for failure to show probable cause for the search.

on March 13, 1975, and been given the information that the informer had been in the CBS warehouse the previous day (221a), as stated in the affidavit (192a). Agent Pecoraro testified that Pollari* had called him at 11 p.m. on March 12, 1975 (250a-251a), and that he had met with Pollari the following morning. On both occasions, he testified, he understood Pollari to say that Pollari had been in the CBS warehouse on March 12 (252a, 255a, 263a). Pecoraro conceded that he had misunderstood Pollari both times (263a-264a).

Pecoraro testified he also had been informed that Pollari would be making a delivery to CBS on March 13 (254a). Because of this, Pecoraro and Dowd commenced surveillance near CBS on March 13, and saw Pollari arrive before they called agent Colgan to tell him to obtain a search warrant (256a, 260a). He testified on cross-examination that he did not recall whether he told agent Colgan, on the telephone, that he had seen Pollari arrive (266a). Indeed, he said that he had gone "blank" and could not remember very much of what he told Colgan at all (266a-267a).

The Court found the affidavit sufficient (268a-269a).

* The informant will be referred to as "Pollari" for the sake of continuity. Pollari's name was not revealed until he testified at the trial.

POINT I

THE RECEIPT IN EVIDENCE OF THE COGAR TESTIMONY CONSTITUTED REVERSIBLE ERROR. THE HEARSAY STATEMENTS CONTAINED THEREIN WERE SO DAMAGING THAT THEY SURELY COMPELLED THE VERDICT OF GUILTY UPON THE SUBSTANTIVE COUNT; YET THOSE STATEMENTS WERE MADE OUTSIDE OF APPELLANTS' PRESENCE AND NOT IN FURTHERANCE OF ANY CONSPIRACY; INDEED, ANY ALLEGED CONSPIRACY WAS PLAINLY CONCLUDED AT THE TIME OF THOSE STATEMENTS.

The District Court received the Cogar testimony, over strenuous objection, on the theory that it reflected statements by alleged co-conspirators in furtherance of the alleged conspiracy. The testimony was received as to the conspiracy count only.*

As a result of this ruling, the jury was permitted to hear of conversations among members of a hijacking ring

* The Cogar testimony was not, and could not have been, received on the substantive count. This was not a case, such as United States v. Stanchich, 550 F. 2d 1294 (2d Cir. 1977), wherein the jury was permitted to consider--as to the substantive count--hearsay testimony initially received under the conspiracy count. In Stanchich, there was sufficient "independent evidence of Stanchich's involvement" and "participation" in the activities of the other alleged wrongdoers to permit the jury to consider this evidence on the substantive count (p. 1299). Here, as we show below, there was no properly admitted evidence of any "involvement" or "participation" on the part of appellants in the activities of the other alleged co-conspirators, beyond the evidence that appellants took possession of the stolen property.

to the effect that the stolen razor blades had been sold to "the rabbis," that "the rabbis" were "stand-up people" who would not give information to law enforcement officers, that the rabbis would pay for the merchandise with money bearing the "Star of David" on the wrappers, and that the Jews "have all the money in New York."

At no time did Cogar identify appellants as "the rabbis" he repeatedly mentioned. Indeed, there was no evidence that Cogar had ever met or seen appellants, or that he had ever heard their names mentioned by any of the other hijackers.

We respectfully submit that the Cogar testimony, in the circumstances of this case, was a bombshell. It was the only evidence in the case tending to connect appellants (or at least persons who looked like "rabbis") with the hijacking of the razor blades and thus tending directly to demonstrate that they had knowledge of the fact that the razor blades had been stolen. Whether appellants knew that the razor blades had been stolen was the most hotly contested issue in the case.

The Cogar testimony was of such stunning impact, we urge, and the remainder of the evidence as to appellants' knowledge that the goods were stolen was so thin, that the Cogar testimony caused the jury to find appellants guilty

on the substantive count.*

The problem is that there was no valid basis on which the Cogar evidence could have been received. The statements related by Cogar took place out of the presence of appellants. They took place after appellants had come into possession of the stolen razor blades, and thus after the alleged object of the alleged conspiracy had been achieved, even assuming the truth of the charges in the indictment. In fact, the statements took place after the goods had been seized and after appellants had been arrested. Thus, we urge, the statements were made at a time when, according to the evidence, appellants could not have been members of any continuing conspiracy.

As is shown above, the District Court itself initially took precisely this view. The Court below was then swayed, however, by the prosecutor's argument that the conspiracy continued beyond the time when appellants received the razor blades, since there was a "purchase" involved and since it was

* It is true that the Cogar testimony was received only under the conspiracy count, and it is true that the jury acquitted appellants of the conspiracy charge. We believe, however, that the conspiracy count should never have been submitted to the jury at all. In any event, the fact is that the Cogar testimony was not excluded from the jury's consideration prior to the submission of the case to the jury. Therefore, it was considered during the deliberations. We believe the Cogar evidence was so powerful that the jury could not help but be affected by it during its deliberation as to the substantive count, regardless of any instructions by the Court.

contemplated that payment would be made by the appellants at a future date.

We show below that in making this argument, the prosecutor led the District Court into error. The indictment failed to charge that a purchase by appellants was contemplated by the alleged conspiracy. Moreover, it could not properly have charged that the conspiracy contemplated a purchase by appellants. As we show below, a purchaser and a seller of contraband, though they may both be guilty of substantive crimes independently committed, ordinarily cannot be co-conspirators since they have different goals and different objectives. They are not, to use a well-worn phrase, "partners in crime."

In any event, as we argue below, even if the prosecutor's argument would otherwise have been proper as a matter of law, here there was absolutely no evidence outside of the Cogar testimony itself even remotely tending to show that appellants were "purchasers" of the razor blades.

- A. That The Alleged Conspiracy Involved A "Purchase" By Appellants, With Payment To Be Made At A Later Date, Was Not Set Forth In The Indictment; It Could Not Have Been, In The Circumstances Of This Case, Since A Purchaser And A Seller Have Different Objectives And Ordinarily Cannot Be Co-Conspirators Of Each Other.

It must be emphasized that there was no evidence tend-

ing to show that appellants had anything whatever to do with the hijacking. On the properly admitted evidence, appellants' only connection with the stolen razor blades was that they came into possession of this merchandise. There is thus no basis for arguing that appellants were somehow involved in all of the broad purposes of a conspiracy that may have been hatched among the hijackers.

Thus, the receipt of the Cogar testimony must be judged solely on the propriety, both as a matter of law and as a matter of fact, of the ruling that the government was entitled to try to prove, on the basis of the possession alone, that appellants were involved in a conspiracy which contemplated a "purchase" by them and payment after the date of delivery.*

* It is noteworthy that trial counsel for appellants saw that the inclusion of the conspiracy count was a tactic on the part of the government to gain a procedural advantage in the admission of evidence, and warned the Court below, in a pre-trial motion brief, of the problems this would cause. In his memorandum of law in support of the initial omnibus motion below, counsel warned that the only evidence linking appellants with the other alleged co-conspirators would be the evidence as to receipt of the stolen property itself, and argued that appellants "would be seriously prejudiced by being required to defend this action on a conspiracy theory even though the conspiracy ground may later be dismissed" (p. 2). Counsel pointed out quite clearly, citing authorities, that mere possession of stolen property does not make the possessor the co-conspirator of him who has stolen the property or transferred it to the possessor (pp. 13-17).

The indictment nowhere hints of a charge that appellants purchased the stolen property, or conspired with others to do so. Count One, the conspiracy count, charged only that appellants conspired "to receive and have in their possession" the stolen razor blades.* Count Two, the substantive count, charged that appellants "did ... receive and have in their possession" the stolen property.**

It would have been open to the government to charge that appellants were buyers of the property, if that is what the government intended to try to prove. Indeed, the statute involved in this case, 18 U.S.C. § 659, almost demands that a purchase be pleaded if a purchase is to be proved. It provides that "[w]hoever buys or receives or has in his possession any such goods [stolen from an interstate shipment] ... knowing the same to have been embezzled or stolen" is guilty of a felony (emphasis added).

* The indictment also charged, as an overt act, that three of the original defendants, not including appellants, met "to discuss the receipt of payment for the said stolen products" (Count One, Overt Act 3). There is nothing in this allegation to suggest that the "payment" would be received from appellants, or indeed from any other alleged conspirator.

** The government's "purchase" theory was not even foreshadowed in the bill of particulars, for there was no bill of particulars. Appellants' motion for particulars was denied in its entirety (80a-81a). The bill requested would at least have set forth all "acts" of appellants "in furtherance of the alleged conspiracy" (20a).

Si government did not take up the statute's invitation . . . had a purchase, it had no right to argue for the first time after the trial began that a purchase was part of the conspiracy.

It has long been settled

"... that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him."

Stirone v. United States, 361 U.S. 212, 217 (1960).

In Stirone, the Court pointed out that the variance between pleading and proof destroyed a "substantial right" of the defendant, because it could not be said with certainty that a "grand jury would have been willing to charge" the unalleged conduct sought to be proved (p. 217); nor could it be said that the conviction was based solely on what was charged (p. 217).

In United States v. Russano, 257 F. 2d 712 (2d Cir. 1958), this Court found that a "prejudicial variance" existed between the proof and the indictment (p. 716). There, the indictment had charged a conspiracy beginning in 1951 and continuing thereafter to 1957 (p. 713). The Court found that the evidence tended to "establish certain dealings in narcotics by the appellants and others during the year 1952" (p. 713), but found there was (p. 716)

"... not only an absence of evidence indicating a continuing conspiracy, but also an absence of evidence indicating that these two appellants were members of any conspiracy that was in existence during 1953 and 1954."

In Russano, the only proof as to activities after 1952 was that there was another, different, conspiracy in 1955 and 1956. Because of the prejudicial effect of the evidence as to one conspiracy on the jury's consideration of the other, this Court found the variance to be material, and to require reversal.

We recognize that a variance may not be prejudicial if it does not affect a substantial right of the accused. F. R. Crim. P. 52(a); Berger v. United States, 295 U.S. 78, 82 (1935). Here, however, a substantial right was affected and real prejudice occurred. Because of the argument that appellants were "purchasers" of the stolen razor blades and intended to pay at a later date, and for no other reason, the Cogar testimony was admitted. Absent that argument, the Cogar testimony would have been excluded on the ground that it related conversations after the end of the alleged conspiracy and therefore not in furtherance of it. Indeed, before hearing the government's new argument about a "pur-

chase," the Court nearly ruled the testimony out (484a).*

Where damaging hearsay statements, such as those tending to implicate a defendant in a crime, are received in evidence on a theory which is not supported by the indictment, a prejudicial error has occurred, and the variance is material. This conclusion is implicit in the recent opinion by this Court in United States v. Lam Lek Chong, 544 F. 2d 58 (2d Cir. 1976). There, although a single conspiracy was charged, two conspiracies were proved. This Court concluded that reversal was not required, however, since no "spillover" effect had resulted (p. 66). The Court said (p. 66),

"The record in this case convincingly demonstrates that any variance stemming from proof

* It is noteworthy that at one point during the trial, the District Court squarely ruled that the conspiracy had concluded at the time the FBI agents entered appellants' warehouse, located the stolen razor blades, and began to interrogate appellants. During the testimony of agent Dowd as to his conversation with appellant Kahan at the time the agents entered appellants' warehouse on March 13, 1975, the Court ruled (359a),

"THE COURT: Now, if you believe Mr. Dowd's testimony and you find that the statements are chargeable about Mr. Kahan, they're chargeable only against Mr. Kahan and not against either of the other accused; these are statements made after the alleged crime had been committed and the statement to be attributable only to the one making it." (Emphasis added.)

of the January 30 dealings did not prejudice the appellants. No out-of-court statements by the unindicted January 30th co-conspirators implicating the appellants were admitted into evidence on the theory that all were part of a single conspiracy." (Emphasis added.)

Here, of course, there occurred the very sort of prejudice envisioned by the Lam Lek Chong Court. Here, extremely important "out-of-court statements...implicating the appellants" were admitted erroneously. The variance clearly prejudiced appellants.

* * *

Even if the government had alleged in so many words that the appellants' role in the alleged conspiracy was to both buy and receive the goods, this would not have cured the error. A receiver of stolen property does not make himself the co-conspirator of the thief merely by the act of receiving. Similarly, a purchaser of stolen property does not make himself the co-conspirator of the thief merely by the act of purchasing. Before a receiver or purchaser of stolen property can be charged to be a co-conspirator with the thieves, there must be pleaded and proved an agreement which is broader than the mere agreement to receive or purchase.*

* Trial counsel for appellants made this point quite clearly and at some length during pre-trial motions (see memorandum in support of omnibus motion, pp. 13-17), but the Court, in making its evidentiary rulings during trial, declined to follow the authorities cited.

One of the leading cases establishing this rule is United States v. Zeuli, 137 F. 2d 845 (2d Cir. 1943) (L. Hand, J.). There, this Court reversed the conviction of Zeuli for conspiracy to steal and receive stolen gasoline ration books, where all that was shown was that he received them. Judge Learned Hand, writing for the Court, said (p. 846),

"Therefore, if the conspiracy was confined to the transaction between Zeuli and Steneck by which the stolen books were sold, although both were guilty of the substantive crime, neither was guilty of conspiracy."*

In Zeuli, the Court found the indictment proper on its face, since it charged Zeuli with participation in a conspiracy encompassing more than his mere receipt of the stolen ration books. But the Court said, "The difficulty was not... in the indictment but in the proof, for the prosecution did

* Judge Hand first referred to the rule that is now known as the "Wharton Rule," under which it is held that persons who have committed a crime which necessarily involves co-operation or agreement, may not also be convicted of conspiracy to commit it. The rule we espouse here, and which Judge Hand enunciated in Zeuli, may be an outgrowth of the Wharton Rule, but is not dependent solely on it. Rather, as we show below by reference to additional authorities, the rule that a purchaser is not the seller's co-conspirator arises from the entirely logical view that a purchaser and a seller are not partners and do not seek the same objective. Thus, those cases in which courts decline to apply the Wharton Rule, on the ground that the number of conspirators exceeds the number of persons necessary to commit the substantive offense, are inapposite. Cf. United States v. Benter, 457 F. 2d 1174, 1178 (2d Cir.), cert. den., 409 U.S. 842 (1972).

not connect Zeuli with the preliminary theft, or with the books at all until after they had been stolen, and at a time when nothing more remained to be done but to dispose of them" (pp. 846-47). The Court then said (p. 847),

"...although he knew them to be stolen, he bought them without any purpose of securing to the thieves the fruits of their theft; the venture, so far as he was concerned, began, as it ended, with the purchase ... His mere knowledge that they had been stolen, made him even less a party to their theft than his knowledge of their future disposition--had that been criminal--would have made him a party to that disposition."

See also United States v. Koch, 113 F. 2d 982, 983 (2d Cir. 1940).

The rule announced in Zeuli apparently remains the law in this Circuit. Zeuli was recently cited by this Court in United States v. Frank, 520 F. 2d 1287, 1290 (2d Cir. 1975), cert. den., 423 U.S. 1087 (1976).

The rule that a receiver of stolen goods does not make himself a co-conspirator of the thief merely by receiving or agreeing to receive the goods is a simple outgrowth of the recognized rule that, "in order to hold a man for joining others in a conspiracy, he 'must in some sense promote their venture himself, make it his own,'..." United States v. Freeman, 498 F. 2d 569, 573-74 (2d Cir. 1974),

quoting United States v. Falcone, 109 F. 2d 579, 581 (2d Cir. 1940) (L. Hand, J.), aff'd, 311 U.S. 205 (1940).

That the basis for the rule is the difference in objectives as between purchaser and seller was made very clear in United States v. Ford, 324 F. 2d 950 (7th Cir. 1963), wherein the Court said (p. 952),

"The relationship of buyer and seller absent any prior or contemporaneous understanding beyond the mere sales agreement does not prove a conspiracy to sell, receive, barter or dispose of stolen property although both parties know of the stolen character of the goods. In such circumstances, the buyer's purpose is to buy; the seller's purpose is to sell. There is no joint objective." (Emphasis added.)

The reasoning of Ford was reaffirmed in United States v. Varelli, 407 F. 2d 735 (7th Cir. 1969), wherein the Court said (p. 748),

"Varelli, Heckmyer, Saletko, Infelice, Legato and Gallo were all involved with the distribution of merchandise stolen in interstate commerce. None of these parties were involved with the theft of either the Polaroid equipment or the silver shipments. The relation of buyer and seller even with knowledge of the character of the goods being sold is insufficient to make the buyer a conspirator." (Emphasis in original.)

The rule has also been recognized in several other circuits. See, for example, United States v. Mayes, 512 F. 2d 637 (6th Cir.), cert. den., 422 U.S. 1008 (1975),

wherein the Court upheld the conspiracy convictions, but quoted the Ford decision and held that the proof demonstrated an understanding "'beyond the mere sales agreement'" (p. 647). See also United States v. Cook, 461 F. 2d 906 (5th Cir.), cert. den., 409 U.S. 949 (1972), wherein the Court, although it affirmed the conspiracy convictions, nevertheless said (p. 910, n. 3),

"We recognize that, absent an agreement to advance a joint interest, such purchases and sales of stolen property would normally not constitute conspiratorial activity."

In the case at bar, the only agreement or understanding alleged against appellants was an agreement to receive and possess the stolen goods. And even though the government attempted to inject the idea of a "purchase" into the case during trial, at no time did the government claim, in the indictment or in argument, that the agreement of appellants was anything more than an agreement to receive and purchase the goods.

That being so, a conspiracy was not properly alleged. Under the above authorities, a person who merely agrees to receive stolen goods cannot be accused of conspiring with the thieves to that end. The Court therefore erred in receiving evidence of hearsay statements implicating appellants on the theory that there was a provable conspiracy, and that the role of appellants in the conspiracy was to "purchase" the stolen property.

- B. Even If A "Purchase" By Appellants Could Have Been Properly Alleged To Have Been The Object Of The Conspiracy, And Even If The Government Had Made That Allegation, The Error Would Not Have Been Cured; There Was No Non-Hearsay Evidence That Appellants Had Agreed To Purchase The Goods, And Therefore Any Hearsay Evidence Received Subject To Such Connecting Proof Should Have Been Stricken.
-

Trial counsel for defendants objected strenuously in advance to the receipt of the Cogar testimony (474a-477a). He renewed the objection after Cogar started to testify (508a). Trial counsel also moved at the close of the government's case, and at the close of all the evidence, for a dismissal of the conspiracy count, and for a concomitant order striking the testimony of Cogar (629a, 883a).

The Court overruled all such objections and denied all such motions, preferring to give the jury the responsibility of deciding whether there was a conspiracy, whether it was of the scope claimed by the government, and thus whether to consider hearsay evidence received under the conspiracy count.

With great respect for Chief Judge Mishler and with deference to his experience, we nevertheless believe that he gave the jury a responsibility which was his alone. Had he shouldered his responsibility properly, we urge, he would

have recognized (a) that no conspiracy at all was proved against appellants; (b) that there was certainly no evidence (of a non-bootstrap variety) that appellants were party to a conspiracy the object of which was a "purchase" by them; (c) that the conspiracy count should be dismissed and all unconnected evidence received under it should be stricken; and (d) at the least, all hearsay evidence received on the theory that the conspiracy continued beyond the date the goods were seized since a "purchase" was involved should be stricken.

The responsibility of the Court to which we refer is that which is described in United States v. Geaney, 417 F. 2d 1116 (2d Cir. 1969), cert. den., 397 U.S. 1028 (1970), wherein this Court said (p. 1120),

"[T]he judge must determine, when all the evidence is in, whether in his view the government has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances...If it has not, the judge must instruct the jury to disregard the hearsay or ... declare a mistrial..."
(Emphasis added.)

It is equally well settled that "each defendant can be held only for an agreement reasonably inferable as to him," and that a defendant's "liability is limited to the common purposes while he remains in it [the conspiracy].'" United

States v. Borelli, 336 F. 2d 376, 385, 387 (2d Cir. 1964), cert. den. sub nom. Cinquegrano v. United States, 397 U.S. 960 (1965).

It seems to us clear that there was no evidence of any conspiracy involving appellants at all, since the only act proved against appellants was that they possessed the stolen goods. There being no evidence at all that appellants were involved in the theft, or that they made any agreement beyond the mere agreement to receive the goods, a conspiracy between them and others simply was not proved. Under the rule of United States v. Zeuli, supra, 137 F. 2d 845 (2d Cir. 1943); evidence of receipt of stolen property cannot by itself establish conspiracy.

Even if there had been some evidence linking appellants with a broader conspiracy to achieve the object alleged in the indictment (the receipt and possession of stolen property), nevertheless the evidence was clear that any such conspiracy ended when that object was achieved, i.e., when the goods came into possession of appellants. Therefore, statements made by alleged co-conspirators after the conspiracy ended should not have been admitted, since by definition they were not in furtherance of the conspiracy. As the Supreme Court said in Dutton v. Evans, 400 U.S. 74, 81 (1970),

"It is settled that in federal conspiracy trials the hearsay exception that allows evidence of an out-of-court statement of one conspirator to be admitted against his fellow conspirators applies only if the statement was made in the course of and in furtherance of the conspiracy, and not during a subsequent period when the conspirators were engaged in nothing more than concealment of the criminal enterprise." (Emphasis added.)

See also United States v. Smith, 520 F. 2d 1245 (8th Cir. 1975), wherein the Court, citing Dutton, expressed the rule in this fashion (p. 1247):

"It is a well-established exception to the hearsay rule that declarations of one conspirator may be used against another conspirator if the declaration was made during the course of and in furtherance of the conspiracy charged...

"... where the hearsay statement was not made in furtherance of the conspiracy because it was made after the objectives of the conspiracy either had failed or had been achieved, it is inadmissible....Neither can it be admitted on the theory that the hearsay statement was made in furtherance of the attempts to prevent detection." (Emphasis added.)

This Court has held, not only that a conspiracy ends when its object is achieved (and that post-conspiracy declarations are not admissible), but also that declarations concerning a defendant who is no longer involved in a conspiracy are inadmissible even though the conspiracy may be continuing. In United States v. Pacelli, 491 F. 2d 1108 (2d Cir.), cert. den.,

419 U.S. 826 (1974), the Court held that a conspiracy to violate a person's civil rights by killing her had ended with her death, and that hearsay declarations subsequent to the death were inadmissible (p. 1115).

In United States v. Borelli, supra, 336 F. 2d 376 (2d Cir. 1964), this Court said (p. 386, n. 4),

"... many, perhaps most, declarations concerning a defendant who was no longer participating in the conspiracy would be barred in any event by the requirement that these be in furtherance of the conspiracy and not be merely narrative."*

Here, if the conspiracy did not end when its alleged object (receipt and possession) was achieved, certainly any such conspiracy ended when the stolen property, which was the subject of the alleged conspiracy, was seized by the government and appellants were arrested. It is difficult to see how there could have been any continuing purpose of the conspiracy after seizure of the goods which were central to it. If there was any evidence of a conspiracy here, nevertheless such conspiracy ended when it "had failed," to use the words of United States v. Smith, supra, 520 F. 2d at 1247.

The District Court in this case itself initially so ruled. The Court said (481a),

* Most of Cogar's testimony would appear to have been mere "narrative" or "'conversation.'" See United States v. Birnbaum, 337 F. 2d 490, 495 (2d Cir. 1964).

"THE COURT: The conspiracy alleged is to possess the goods, there's no question that the possession ceased when the goods were seized by the government, right?"

It was at this point that the prosecutor somehow persuaded the Court that the conspiracy continued because a purchase was involved, and because payment was to be completed at a subsequent date. The District Court did not realize at first that there was no evidence to support this new theory. The Court was under the impression that the jury had "heard that these defendants were the purchasers" (490a). When defense counsel pointed out that the only mention of a purchase had been during the prosecutor's opening statement, the Court quite properly asked the prosecutor to identify the evidence claimed to support the "purchase" theory.

The prosecutor then conceded that he had no "direct" evidence, but "only circumstantial" (490a).

The Court then demanded to know what "circumstantial" evidence was being referred to. The prosecutor could only point (490a) to the fact that Mr. Bridgeforth, the truck driver, had testified that he had heard one of his abductors say, "The buyer was well satisfied with the load" (295a).

On this basis, the Court ruled that the evidence was admissible, and that there was "evidence to support the gov-

ernment's theory" that "payment was due to the hijackers for the merchandise" (493a).

With respect, the Bridgeforth testimony seems to us to demonstrate, not that appellants were the purchasers, but that the purchasers could not possibly have been appellants. Bridgeforth heard one of the hijackers say "The buyer was well satisfied with the load" during his ordeal on the night of March 11, 1975. He heard this statement after his truck had been intercepted and while he was still in the hijackers' car.

But there is no evidence that appellants had any connection with the stolen property as of the night of March 11, 1975. There was some evidence that some of the goods might have been driven to appellants' warehouse on March 12, 1975. They had not seen the goods, so far as this record shows, before that. If there was a buyer who had seen the goods, and who was "well satisfied," that buyer certainly was not any of the appellants.*

* In summation, the prosecutor argued that the jury could infer that one of the appellants personally inspected the "load" on the night of March 11, 1975. There was no evidence at all to support this, and the prosecutor never offered any. The argument, we respectfully suggest, was improper.

There being no evidence to support the government's speculation that appellants were the purchasers, the Court erred in ruling that the conspiracy extended beyond the possession, and the seizure and arrest. The Court should have excluded statements made after that time; at the least, it should have stricken evidence of those statements.

In the course of ruling that the Cogar testimony was admissible, the District Court cited United States v. Franzese, 392 F. 2d 954 (2d Cir. 1968), vacated on other grounds sub nom. Giordano v. United States, 394 U.S. 310 (1969). There, evidence as to acts--not declarations--after the date identified in the indictment as the closing date of the conspiracy had been admitted. It was clear that acts which were highly material to the main object of the conspiracy were still going on after the date set forth in the indictment, and that the acts were not mere efforts "to conceal a crime fully accomplished" (p. 964).* Had they merely been efforts to cover up a completed crime, they would not, of course, have operated to extend the period of the conspiracy. See Krule-

* Here, of course, there were no continuing acts in furtherance of the conspiracy after the arrests, even on the government's theory that the conspiracy initially contemplated a purchase and subsequent payment. Even on that theory, the conspiracy was frustrated by the arrests and seizure of the goods. In any event, as shown above, a mere purchase, in the circumstances of this case, could not be a "conspiratorial activity." United States v. Cook, supra, 461 F. 2d 906, 910 (5th Cir. 1972).

Witch v. United States, 336 U.S. 440 (1949); Grunewald v. United States, 353 U.S. 391 (1957). Compare United States v. Flecha, 539 F. 2d 874 (2d Cir. 1976), a case involving charges of a conspiracy to possess marijuana with intent to distribute it, wherein a statement made shortly after "all the defendants had been arrested" while in possession of the marijuana was held by this Court to have been properly excluded on the ground that "the conspiracy was over and the statement was not in furtherance of it" (p. 876).

The problem with Franzese is that it did not deal with hearsay declarations; it involved events and acts of co-conspirators. See Lutwak v. United States, 344 U.S. 604 (1953), cited in Franzese (p. 964, n. 14), wherein the Supreme Court held that while acts which take place after a conspiracy has ended may be relevant to show the existence of the conspiracy, "Declarations stand on a different footing" (p. 617). Noting that declarations of co-conspirators are hearsay, the Court observed that they are only received when made in furtherance of the conspiracy and said, "There can be no furtherance of a conspiracy that has ended" (pp. 617-18).

Franzese therefore does not support the government's position. Here, unlike there, there were no activities in furtherance of the main objects of the conspiracy after the

possession and seizure. And here the government offered post-conspiracy hearsay declarations by alleged co-conspirators against appellants, not evidence of physical acts.

* * *

There was another, and entirely independent, ground on which the Cogar testimony should have been excluded. The out-of-court statements to which Cogar testified were nearly all made by Stanley Diamond.

There was no evidence that Diamond was a co-conspirator.

Trial counsel for appellants made this point very clearly, but the District Court rejected it (618a-624a).

It is at best arguable from the substance of Diamond's statements themselves that Diamond only knew of the hijacking and the plans to dispose of the stolen property. It is settled, however, that mere knowledge of a conspiracy does not make one a co-conspirator. United States v. Sisca, 503 F. 2d 1337, 1343 (2d Cir. 1974), cert. den., 419 U.S. 1008 (1974). There was no evidence that Diamond contributed anything to the hijacking venture, that he associated himself with it by any act, or that he did anything to promote or further it.

The only other argument by the government in support of the proposition that Diamond was a co-conspirator was to the effect that the evidence showed that Diamond was frequently in the company of the hijackers, and that he played cards with them several times at the establishment of Thomas DeCandia (623a).

This also is insufficient. As this Court said in United States v. Torres, 519 F. 2d 723, 726 (2d Cir.), cert. den., 423 U.S. 1019 (1975),

"... membership in a conspiracy is not established by evidence of mere association with conspirators..."

Accord: United States v. Steinberg, 525 F. 2d 1126, 1134 (2d Cir. 1975), cert. den., 425 U.S. 971 (1976).

POINT II

THE GOVERNMENT'S EFFORTS TO PROVE A "PRIOR CRIME" BY APPELLANTS CREATED HIGHLY PREJUDICIAL ERROR; THE EVIDENCE AND THE MANNER IN WHICH IT WAS PRESENTED WERE INFLAMMATORY, BUT THE EVIDENCE HAD NO PROBATIVE VALUE AT ALL, SINCE IT WAS NEVER EVEN SHOWN THAT THE GOODS POSSESSED BY APPELLANTS ON A PRIOR OCCASION WERE STOLEN.

As this Court said in United States v. Robinson, 544 F. 2d 611, 618 (2d Cir. 1976), quoting I Wigmore on Evidence (3rd Ed.) § 57, p. 456,

"The deep tendency of human nature to punish, not because our [defendant] is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of Court."

We believe that the government here, deliberately or inadvertently, appealed to the unfortunate tendency of human nature referred to in Robinson. The appeal was apparently successful. To bolster a weak case, the government introduced evidence of what it claimed was a prior similar crime by appellants.

The jury was given to understand, both by the trial judge and the government's witnesses, that the evidence being introduced related to an alleged prior "crime" consist-

ing of knowing possession of stolen property on an earlier occasion, and was being introduced on the question of intent in the case then on trial.

This Court has held that a prior similar act offered on the question of intent must be proved by a preponderance of the evidence before it may be considered. United States v. Leonard, 524 F. 2d 1076, 1091 (2d Cir. 1975), cert. den., 425 U.S. 958 (1976). In Leonard, the Court also held that the "probative value of similar acts used to prove willfulness or intent is dependent on the existence of a close parallel between the crime charged and the acts shown ..." (p. 1091).

Here, the jury was plainly left with the impression that some evidence of a prior crime had been introduced, that some evidence of a prior possession of stolen property by appellants had been introduced.

The fact is, however, that the government proved only a prior act by appellants which was entirely innocent, and which bore no "parallel" at all to the crime charged in this case, let alone a "close parallel."

What the government proved, through the testimony of FBI agent Colgan, was that on February 4, 1975, roughly five weeks before the events involved in this case, appellants had in the premises a quantity of products of Whitehall Labora-

tory. There was no evidence that these were stolen products.*

It is apparent that the only reason the District Court even permitted the government to embark upon this line of evidence was that the government had previously represented that it would prove the goods were stolen through the "Whitehall people" (238a). In fact, in ruling on the proffer of evidence concerning the Whitehall products, the District Court said (271a),

"... I'll allow it as a prior similar crime. But, that's on the representation that there will be testimony that points to the unlawful possession by some third person of those drugs before they were delivered to the CBS Warehouse on February 4th or thereabouts."

The government did not fulfill its promise.

The government called Harry Devine, a traffic and warehouse manager for Whitehall. Mr. Devine identified a Whitehall

* Agent Colgan testified that he had gone to CBS warehouse because he had "information" that "a stolen load of Whitehall Laboratory products" could be found there (408a). Before he could be stopped, he testified that he found at CBS "a large quantity of these stolen items" (408a). The trial judge immediately recognized that agent Colgan was not competent to testify that the goods were "stolen," and instructed the jury that this statement was "a conclusion" (408a). The trial judge instructed the jury that the government would "first have to present evidence to show that the merchandise was stolen" (409a). The Court said that only if the government convinced the jury that there was "a prior similar crime" could the evidence be considered, and then only on the question of intent (409a).

manifest (Gov. Ex. 26) reflecting a shipment of products from Whitehall's New Jersey plant to its Dallas, Texas warehouse (576a). But Mr. Devine did not testify that the products were stolen. The only testimony he gave even remotely relating to the fate of the products was the following (577a):

"Q. And did that shipment reach Dallas, Texas?

"A. No, it did not."

This, we submit, does not show any theft, any hijacking, any embezzlement, or any unlawful taking of any kind.

Mr. Devine testified that most of the goods were ultimately returned to him by the FBI (578a-579a). A prejudicial note was added when the government elicited that several cases of the products were retained by the FBI "as evidence" (580a).*

* The device of suggesting illegality, and suggesting that the Whitehall incident was similar to the Schick products incident--without actually proving either contention--was a device used several times by the government in the course of the trial. During Colgan's testimony, for example, the government elicited the following statement from the witness (447a-448a):

"Like the Schick products, the majority of that shipment was returned to the rightful owners, Whitehall Laboratories ... with a small number of cartons being kept as evidence by the FBI." (Emphasis added.)

In essence, all the government proved was that on February 4, 1975, appellants were in possession of some Whitehall goods. It was not shown that they were stolen. It would have been surprising if appellants were not in possession of some goods on February 4, or on any other day, since they were warehousemen. It was their business to be in possession of goods.

Rule 403 of the Federal Rules of Evidence provides for exclusion of evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury ...". Here, the evidence concerning the Whitehall incident presented all three dangers, and had no probative value at all. Since there was no proof that the Whitehall products were stolen, the evidence concerning the Whitehall incident was incapable of telling the jury anything about the intent of the appellants. Yet the evidence was received solely on the question of intent.

In United States v. Robinson, supra, 544 F. 2d 611 (2d Cir. 1976), the Court reversed a conviction for bank robbery because of the admission of evidence that the defendant was observed to be in possession of a handgun some ten weeks after the robbery. The Court found that the chain of inferences which would have to be constructed in order to make a connection between the robbery and the possession of the weapon ten weeks later was so long that the probative value of the evidence was "slight" (p. 618).

In United States v. Leonard, supra, 524 F. 2d 1076 (2d Cir. 1975), this Court concluded that a portion of the government's evidence concerning assertedly similar prior acts was completely without probative value. In Leonard, a prosecution for income tax evasion, the government attempted to prove that the defendant, on a different occasion, had made a false affidavit to the effect that he had had no foreign bank accounts and no dealings with foreign banks (p. 1086). In order to prove the falsity of the first of the statements in the affidavit (that the defendant had no foreign bank accounts), the government offered testimony that the defendant had received from an official of the Chase Manhattan Bank a series of bank checks which were payable to the defendant on remittance instructions issued by a Swiss bank (p. 1086). The defendant argued that this testimony "did not show that Leonard personally had any Swiss bank accounts, since the numbered account at the [Swiss bank] whence the remittance to CMB was made, might have belonged to a corporation owned by him or even to an outsider..." (p. 1090). This Court agreed (p. 1090):

"We think that this contention is valid and that if Leonard's trial counsel had requested an instruction that the jury could not find this portion of the affidavit to be false, he would have been entitled to it."*

* The Court did not rule that the affidavit should have been excluded entirely, inasmuch as there was some evidence that the second statement in it (that the defendant had no "dealings of any nature with any foreign banks") was indeed false.

Evidence as to a supposed prior similar crime should not be received, we suggest, unless it includes at the least some basis from which a rational jury could conclude that there was a prior similar act or crime.* Here there was no such basis, yet the jury was led to believe (by the conclusory references of the witnesses to "stolen" property and "evidence" and by the trial judge's statements) that such a basis existed.

The error was compounded by the District Court's closing instructions to the jury. The Court referred to

* The government argued that even if it were not actually proved that the goods were stolen, nevertheless the Whitehall incident was relevant to appellants' intent. The government urged that appellants were told that the goods were stolen, and therefore should have regarded any shipment of goods--even one received five weeks later under shipping documents bearing different names--with suspicion, because of alleged similar circumstances including similar handwriting on the documents of title. On its face, this argument would appear frivolous, since the business of appellants was such that they would receive many shipments of goods over a five-week period, and since they certainly were not claimed or shown to be handwriting experts themselves. The District Court correctly rejected this contention (1060a-1066a), saying (1061a-1062a), "God help us if your theories were adopted, because in any large business where supervision is left to underlings...even though it was innocently done, that is enough to put them on notice...." The Court also said (1063a),

"What you want to do is, you want to use a prior innocent act that's similar on criminal intent and I don't think the law has gone that far." (Emphasis added.)

the "drugs allegedly owned by Whitehall," and said, "This evidence was offered as evidence of a prior similar crime" (1049a). The Court further instructed (1049a-1050a),

"In this case you may use proof of a prior crime if you think a prior crime was committed on the issue of criminal intent. For example, if you think the evidence shows beyond a reasonable doubt that the accused unlawfully possessed and knowingly possessed the Whitehall aspirin on or about February 5th, then you may use that evidence on the issue of intent as to whether, in this case, in the crime charged in this indictment, the accused was aware that the Schick product was stolen."

The Court had previously said (1049a) that the jury would "decide whether there was a prior crime, whether there was a prior theft or other unlawful deprivation...of another's property and in this case, Whitehall." But the Court's failure to instruct that the evidence could not be used at all unless it was found that the Whitehall products were stolen was a glaring omission from the final charge on the "prior crime" question, quoted above.

The more basic error, however, was that the charge on prior crimes was given at all. It should not have been given, because there was no evidence to support it. There was no evidence from which a rational jury could have concluded that appellants knowingly possessed stolen Whitehall products on February 4, 1975, whether beyond a reasonable doubt as charged or by a preponderance of the evidence.

The notion that a Court errs by instructing a jury on a matter as to which there is no evidence is not novel. It has long been recognized that such a charge invites the jury to speculate, and misleads the jury into thinking that the non-existent evidence was in fact offered.

In United States v. Breitling, 61 U.S. (20 How.) 252, 15 L.Ed. 900 (1858), Chief Justice Taney wrote (15 L.Ed. at 902),

"It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony." (Emphasis added.)

This Court has applied the same rule. See, e.g., United States v. Negro, 164 F. 2d 168 (2d Cir. 1947).

In a case bearing many similarities to this one, the Court of Appeals for the Fifth Circuit has squarely ruled that it is reversible error to charge a jury as to prior similar acts where the proof of such acts does not establish the alleged similarity. United States v. Torrence,

480 F. 2d 564 (5th Cir. 1973). Torrence was a prosecution in which it was alleged that the defendant had bilked a widow by pretending affection and soliciting funds from her "for investment." The government offered evidence that on two prior occasions Torrence had formed friendships with women and had obtained large sums of money from them. "At that point, however," the Court said, "the parallel with the Government's primary witness ends" (p. 565). The evidence disclosed that both of the women involved in the incidents claimed to be prior similar acts had never been more than mere friends of the defendant, and that the friendly relationship continued to the present. The evidence showed that the money they paid to Torrence represented repayments of loans he had made to them. There was no showing that either woman had been defrauded.

The Court said (p. 565),

"... Torrence argues that no such charge [as to other similar acts] should have been given because there was no evidence to support it. We agree With no other evidence to even suggest Torrence's involvement with prior similar acts, the court's charge, even though an arguably correct statement of the abstract rule, ... impermissibly allowed the jury to infer intent from allegedly similar acts nowhere evidenced in the record.... This was reversible error and requires a new trial." (Emphasis added.)

The evidence by which the government sought to prove a prior similar act should have been excluded in this case. Failing that, it should have been stricken, and the jury should have been instructed to disregard it. Certainly, there should have been no instruction to the jury that it could infer intent from prior similar crimes. No prior similar act, and certainly no prior similar crime, was shown. The Whitehall goods were not shown to be stolen at all.*

* We respectfully suggest that the proof concerning the Whitehall incident would have been insufficient even if it had been shown that the goods were stolen. This is because there was no proof whatever from which a jury could rationally infer that the appellants knew the Whitehall goods were stolen. It might be suggested that a jury can infer knowledge from the mere fact that a person is in unexplained possession of recently stolen goods. Here, of course, appellants were warehousemen, and so, to that extent, their possession would not be unexplained. More importantly, we respectfully suggest that the "inference" cannot properly be drawn where the question of knowledge is raised in connection with a collateral act, and not in connection with the act for which a defendant is being tried. The "inference" which may be drawn from possession of recently stolen property is not a rule of law, and may be drawn only when the jury feels it is warranted from all of the facts and circumstances in the case. See Barnes v. United States, 412 U.S. 837 (1973), wherein the Supreme Court upheld a jury instruction to the effect that the jury could draw the inference only if warranted by "the surrounding circumstances shown by the evidence in the case" (p. 840, n. 3). Where the alleged prior possession of stolen property is a collateral issue and is not the crime with which the defendants are charged, we respectfully suggest that it is neither practical nor desirable to show all of the facts and circumstances surrounding the incident, for this would unduly complicate and lengthen the trial and would surely confuse the jury. It would also create constitutional questions concerning whether the defendant was actually tried for the crime with which he was charged by the grand jury. That being so, the jury can never know all of the surrounding facts and circumstances, and thus would not be justified, we urge, in drawing any "inference," which may arise from mere possession.

POINT III

THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS THE FRUITS OF THE MARCH 13, 1975 SEARCH OF APPELLANTS' PREMISES; THE AFFIDAVIT IN SUPPORT OF THE APPLICATION FOR THE SEARCH WARRANT FAILED ON ITS FACE TO SHOW PROBABLE CAUSE, AND IN ANY EVENT WAS DEFECTIVE BECAUSE IT CONTAINED A MISSTATEMENT AS TO A HIGHLY MATERIAL FACT.

The search of the CBS warehouse on March 13, 1975 was conducted pursuant to a search warrant. The warrant was obtained on the basis of an affidavit made by agent Patrick Colgan, which rested on information supplied by agent Robert Pecoraro, who in turn relied on statements by the informer, Pollari.

Colgan's affidavit, sworn to March 13, 1975, simply stated that the FBI had been informed that a large quantity of Schick products had been hijacked, and that a reliable informant had seen a great number of cartons of Schick products in appellants' warehouse on March 12, 1975 (135a). The informer evidently said also that the products he saw bore "the Schick, Inc., Spec No. 02-40 on the cartons" (135a).

The affidavit was deficient for two reasons:

1. The affidavit referred to no contention by the informer, let alone a demonstration, that the goods allegedly seen by the informant at the CBS warehouse were stolen, or were part of the

hijacked load involved in this case; even if such a contention could be read into the affidavit, there was no statement of the basis for any such contention.

2. In any event, the fact is that the informer Pollari did not see any stolen Schick products within appellants' premises on March 12, 1975, or indeed at any other time prior to the making of the search warrant affidavit.

Before discussing these deficiencies, we should point out that the search and seizure of the Schick products in this case must be judged on the validity of the search warrant and affidavit alone. The goods were not seized in the course of any proper search incident to a valid arrest, since there was no arrest until well after the search and seizure. Nor has the government at any time claimed that the goods were seized other than pursuant to the search warrant. This is not a case such as United States v. Galante, 547 F. 2d 733 (2d Cir. 1976), wherein goods were initially located pursuant to an invalid search warrant, but not seized at that time. In Galante, after discovering the goods, the FBI placed the premises under surveillance, and later arrested the defendant as he was loading his truck with the stolen goods. The arrest would seem to have been supported by probable cause, and the seizure of goods

then in his immediate physical possession would also seem to have been proper without a warrant. The circumstances here are entirely different. Here, the FBI agents remained under cover while they saw Schick goods being unloaded from trucks and carried into a seven-story building, only three floors of which were occupied by appellants' warehouse business. They then waited an hour before entering the building, and only entered it after they had obtained a search warrant. The agents obviously believed that they would have no right to enter and make an arrest without first locating the goods, and that they would have no right to enter and search for the goods without a search warrant. We agree.

A. The Affidavit Was Insufficient
On Its Face To Provide Probable
Cause, Even If Every Word In It
Were True.

A search warrant may be issued for the purpose of searching for and seizing certain goods, and only those goods. Under Rule 41(b), Fed. R. Cr. P.,

"A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense."

A search warrant must certainly provide probable cause to believe that a crime has been committed, but it must do more than that. It must justify an intrusion into the home or office of an individual, the sanctity of which is protected by the Fourth Amendment.* Thus, the affidavit must also show that there is reasonable ground to believe that the premises to be searched contain evidence or the fruits of a crime, or the means of committing a crime. There must be a connection between the crime and the search. So said the Supreme Court in Warden v. Hayden, 387 U.S. 294, 307 (1967):

"There must, of course, be a nexus-- automatically provided in the case of fruits, instrumentalities or contraband--between the item to be seized and criminal behavior. Thus in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction." (Emphasis added.)

This Court also has referred recently to the requirement that a search warrant affidavit set forth probable cause to believe "that a crime is being committed or evidence of it

* See Warden v. Hayden, 387 U.S. 294, 304 (1967) ("... the principal object of the Fourth Amendment is the protection of privacy ..."). And the object of the warrant requirement in the Fourth Amendment is to ensure that the decision whether sufficient cause exists to intrude upon a person's privacy is made by a "neutral and detached magistrate." Aguilar v. Texas, 378 U.S. 108, 112-13 (1964).

kept on the premises to be searched," United States v. Karathanos, 531 F. 2d 26, 30 (2d Cir.), cert. den., 428 U.S. 910 (1976) (empl. sis added).

Here, the affidavit made no showing whatever that the goods purportedly seen by the informant on the appellants' premises were stolen or were part of the hijacked load. Nor did it make any effort to show that the premises to be searched contained any evidence of crime.

The only passage in the affidavit referring to the goods seen at CBS warehouse was the following sentence (135a):

"While in the above-described warehouse, the reliable informant observed several thousand cartons of Schnick [sic.] super two bonded razors, bearing the Schnick, [sic.] Inc. Spec No. 02-40 on the cartons."

Schick shaving products are not individually very expensive items. They are not unique, and they are not rare. We may consider for purposes of argument that if the Hope Diamond were stolen, and if a reliable informant thereafter observed a very large blue gem secreted in a warehouse nearby, there might be probable cause for a search. Schick razors, however, are a different sort of commodity. At the moment when, according to the affidavit there were several thousand cartons of Schick products on the CBS premises, there were probably several thousand cartons of identical products in many other warehouses as well.

Nor did the "Schick, Inc. Spec No. 02-40 on the cartons" provide any reasonable ground to believe that the articles observed had been stolen. From the very face of the affidavit, it is clear that the number "02-40" was a product specification number assigned to the items by the manufacturer. It obviously applied to all Schick products of that type wherever found; it clearly was not a code designed to identify the particular shipment which was hijacked from the Time-DC trailer in New Jersey. The prosecutor specifically conceded that "02-40 is a specification ... which indicates a product and not an identification number" (152a) and the District Court specifically found that the number is "the manufacturer's code number designating the type of goods packaged in the carton" (161a).*

Even if the Colgan affidavit could be tortured to the point where it could be said to allege that the goods supposedly seen at CBS by the informer were the stolen goods, the affidavit would still be insufficient. That is because the affidavit is based upon hearsay statements by a paid informer. It has

* Despite this, the trial court found that probable cause existed, citing Vitali v. United States, 383 F. 2d 121 (1st Cir. 1967). Vitali is inapposite. Although Vitali held that there is no obligation to prove that the non-unique goods being searched for "necessarily are the ones stolen," nevertheless the Court there held that there is an obligation "to show circumstances indicating this to be likely" (p. 122). Such "circumstances" were set forth in the affidavit in Vitali, but were not set forth in the affidavit here.

been held by this Court that an affidavit made on this basis must contain "'some of the underlying circumstances on forming the basis of the informant's conclusion that there is illegal activity or evidence thereof on the premises ..." United States v. Karathanos, supra, 531 F. 2d 26, 29 (2d Cir. 1976). See also United States v. Bailey, 448 F. 2d 408, 411 (9th Cir. 1972) ("... affidavit ... must contain a statement of the underlying circumstances 'to enable the magistrate independently to judge of the validity' of the affiant's conclusion that the goods to be seized are where he says they are"). None of the circumstances forming the basis for the informant's conclusion here that the stolen goods were on the CBS premises were set forth.

The affidavit which was the subject of Karathanos was far more detailed than the Colgan affidavit here. In Karathanos, the informant had told immigration agents that eleven "illegal aliens" had been arrested during the past five years at the premises in question. The affidavit stated that the informant knew that at least eight persons then employed were illegal aliens, including six persons with whom he shared cramped living quarters in the basement of the premises. This Court nevertheless held (p. 31),

"To infer that the informant reached his conclusion in a reliable manner (e.g., through admissions by the aliens) rather than in an unreliable manner (e.g., through rumor or assumptions based on observations of physical appearance and the like) would be to permit a warrant to issue on the basis of a degree of speculation proscribed by the Aguilar-

Spinelli test. While an affidavit supporting a search warrant should not be read in a grudging or technical manner, ... neither should it require the magistrate, or a reviewing court, to use imagination to supply essential details critical to determining probable cause." (Emphasis added.)

It seems to us that the present case is in many ways the a fortiori case. If the relatively detailed affidavit in Karathanos was held insufficient, then the skeletal affidavit supplied to the magistrate in this case should also be held insufficient.*

B. In Any Event, The Search
Warrant Affidavit Contained A
Misstatement Of Material Fact.

Although the affidavit stated that the informant "was in the above-described premises known as CBS Warehouse on March 12, 1975" (135a) and saw the goods there at that time, the statement was completely untrue. The plain fact was that Pol-

* It would not matter that probable cause may have actually existed, if the appropriate information and circumstances were not supplied to the magistrate. As the Court said in Spinelli v. United States, 393 U.S. 410, 413, n. 3 (1969),

"It is, of course, of no consequence that the agents might have had additional information which could have been given to the Commissioner. 'It is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention.' Aguilar v. Texas, 378 U.S. 108, 109, n. 1 (emphasis in original)."

lari did not go anywhere near CBS on March 12, 1975 and he saw no goods there on that date. When asked where he went on March 12, 1975, he said only that he went to the S&F warehouse (327a-329a). Indeed, while it is true that Pollari was present outside the CBS warehouse the next day, March 13, the fact is that he did not enter the CBS premises on that day, either. When he was asked whether he brought the goods "into that warehouse," he corrected the questioner by saying instead that he had put the goods on "pallets" and that others "were taking them away and putting them on the elevator" (336a).

Before going further, we must point out that what is involved here is a misstatement that cannot be dismissed as a mere one-day mistake about dates which did not affect the issuance of the warrant. The affidavit supporting the application for the warrant, insofar as it referred to goods being present at CBS, was based solely on what Pollari had done on March 12, 1975 and on what he had told the FBI on March 12 and early in the morning on March 13, before making the delivery. It was not based on anything Pollari told the FBI later in the day on March 13, because he did not speak with the agents later in that day. The agents did not reveal their presence while the unloading was going on on March 13 and so Pollari could not have spoken with them without giving them away. Nor did the affidavit recite that it was based upon anything that any FBI agents saw during their surveillance of CBS on March 13.

Whether the affidavit could have recited the agents' observations is immaterial; it did not describe them.

Since the pertinent portion of the affidavit was based solely on information as to what Pollari allegedly saw on March 12, the only pertinent inquiry is whether the misstatements as to what he saw were sufficiently important to invalidate the warrant.

This Court has stated in United States v. Pond, 523 F. 2d 210, 213 (2d Cir. 1975), cert. den., 423 U.S. 1058 (1976), aff'g 382 F. Supp. 556 (S.D.N.Y. 1974), that a search warrant affidavit which contains a misrepresentation is defective if the misstatement is either deliberate or material:

"Appellants also argue that the affidavit contained a misrepresentation which they argue was knowing (and therefore intentional) as well as material, either of which would support a reversal under United States v. Gonzalez, 488 F.2d 833 (2d Cir. 1973)."

We do not know whether the misstatement was intentional, although it seems exceedingly strange that agent Pecoraro could have failed in two separate conversations with Pollari to ascertain whether Pollari had in fact been personally present at CBS on March 12.*

* It also appears that the affidavits used by the FBI in such cases as this one are not tailored to the facts of individual cases, but instead follow a form. Compare the affidavit in this case with the affidavit in United States v. Galante, supra, 547 F. 2d 733, 736, n. 1 (2d Cir. 1976). The similarity is remarkable.

Whether or not the misrepresentation was deliberate, it was, without question, material. It was plainly a statement without which the warrant could not possibly have issued. The false statement as to Pollari's supposed presence and observations at CBS on March 12 was the only statement in the entire affidavit identifying appellants' premises and setting forth any sort of reason to search them. We have urged above that the reason stated was itself insufficient. Putting that to one side, however, the fact is that without the false statement the magistrate would not even have known the name of CBS.

It has been suggested quite recently that the materiality of misrepresentations in an affidavit in support of an application for a warrant should be judged by the device of viewing the affidavit as if the misstatements were not there, and deciding whether probable cause exists without them. This method was used in United States v. Esparza, 546 F. 2d 841 (9th Cir. 1976), a case involving an arrest warrant, wherein the Court said (p. 844),

"Purged of these inaccuracies, the facts would not support a finding by the magistrate of probable cause. The misrepresentations made it impossible for the neutral magistrate to exercise his independent judgment."

The same approach has been adopted in the Fifth Circuit. See, e.g., United States v. Thomas, 489 F. 2d 664, 667 (5th Cir. 1973), cert. den., 423 U.S. 844 (1975) ("... after

deleting the erroneous statements, the affidavits were totally lacking in facts tending to show the requisite probable cause...").

We believe that the same test is applied in this Circuit. We reach this conclusion from a review of the District Court's opinion in United States v. Pond, reported at 382 F. Supp. 556 (S.D.N.Y. 1974). There, the Court said (p. 560),

"The pivotal issue in this case is whether the misrepresentation or the misstatement in the affidavit was 'material', that is, whether it was of such a nature that were it not found in the affidavit, no finding of probable cause could be made and the warrant could not have been issued."

On appeal, although this Court seems not to have dealt directly with the question when a misstatement is "material," nevertheless it affirmed the District Court decision. United States v. Pond, supra, 523 F. 2d 210 (2d Cir. 1975). It is noteworthy that in deciding the Pond appeal, this Court also made a judgment as to the sufficiency of the affidavit "without consideration of the statement regarding disproportionate weight," which statement had been found by the lower court to be a misrepresentation (p. 214).

The affidavit in this case will not pass this test. Purged of the misrepresentation, it contains nothing which could possibly have justified a search of appellants' premises.

CONCLUSION

For the foregoing reasons, the judgments below
should be reversed.

Respectfully submitted,

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Service of three ② copies of the within BRIEF FOR DEFENDANT
ELLAN 76 is admitted this day of 19

UNITED STATES ATTORNEY
FOR THE EASTERN DISTRICT OF
NEW YORK -

Jul 1 10 54 AM '77

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